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NO. 89-7631

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

WILLIAM FRANK PARKER — PETITIONER

v.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

I.

THE PETITION WAS NOT TIMELY FILED

Parker's conviction and sentence were affirmed by the Arkansas Supreme Court on November 6, 1989. He did not file a petition for rehearing. By the Rules of this Court, his petition was due to be filed with this Court within 90 days of the affirmance by the Arkansas Supreme Court. See Rule 13 of the Rules of the Supreme Court of the United States. His petition was docketed with this Court on May 29, 1990, well after the 90-day time limitation had run. No extension of time was sought by the petitioner or granted by this Court for the filing of the instant petition.

Parker has argued that his failure to timely file the petition should be excused because he was not represented by counsel. While it true that the Arkansas Supreme Court did relieve Parker's attorneys from further representation of him, nothing is suggested that would have prevented Parker from asking this Court to appoint him counsel. Moreover, as his introduction it his petition mentions, Parker made it be known that he wanted to abandon his appeals and to be executed. In fact, he rejected the efforts of one of his present counsel to attempt to intervene in his case to pursue post-conviction relief. However, a few days prior to his execution scheduled for February 28, 1990, Parker

changed his mind and decided to fight his execution. The instant petition was not filed until May 29, 1990. Thus, rather than this being a situation where he was prevented, by lack of counsel, from filing a timely petition for certiorari, Parker waived his right to file a petition for certiorari by failing to exercise the option in a timely fashion. Therefore, this Court should decline to entertain the petition.

II.

PARKER WAS NOT PLACED IN DOUBLE JEOPARDY

Parker argues that his conviction for capital murder and sentence of death were entered in violation of the double jeopardy prohibitions of the United States Constitution. He contends that the Arkansas Supreme Court extended the "trial error" exception of the double jeopardy rules beyond what this Court has recognized and in a way that makes a nullity of the double jeopardy clause. He asks this Court to summarily vacate the conviction and sentence or to set the matter for plenary consideration to determine the applicability of the double jeopardy rules to this situation. The respondent asserts that no double jeopardy violation occurred in this case and urges the Court to deny the petition filed herein.

At his first trial, Parker was convicted of two counts of capital felony murder. In Parker's first appeal to the

Arkansas Supreme Court, his attorneys argued that his convictions for capital felony murder had violated the merger doctrine associated with the felony murder rule because the State had charged him with burglary/murder and the object of the burglary was the entry of the Warren home with the intent to commit murder. The Arkansas Supreme Court agreed and determined that the facts of the case could not support the State's legal theory contained in the information. According to the Court's opinion, the State adequately proved burglary and murder, but failed to prove that the murders were committed during the course of or in furtherance of the burglary. The Court noted that Parker could have been charged under subsection (1)(c) of § 41-1501 [now codified as Ark. Code Ann. § 5-10-101(a)(3)] for causing the death of two or more persons in the course of the same criminal episode. Parker v. State, 292 Ark. 421, 425-26, 731 S.W.2d 756, 758 (1987). Thus, the problem was in the way the charge had been filed (the State's legal theory of the case) not a deficiency in the State's proof. Parker did not challenge the sufficiency of the evidence in his first appeal. After the reversal of his first convictions, an amended information was filed charging Parker with one count of capital felony murder alleging that he acted with the premeditated and deliberated purpose of causing the death of any person, he caused the death of

James and Sandra Warren in the course of the same criminal episode.

In the case of Montana v. Hall, 481 U.S. 400 (1987), this Court reversed a Montana Supreme Court decision which held that Hall had been convicted of an offense which did not exist at the time of the crime, an ex post facto violation, and that the double jeopardy clause prevented his retrial. The facts of the Hall case indicate that Hall was charged with felony sexual assault for having assaulted the twelve-year-old daughter of his ex-wife. Hall's attorneys filed a motion to dismiss the information arguing that he could only be prosecuted for incest. The trial court agreed and granted the motion to dismiss. The State promptly filed a new information charging him with incest. He was convicted of incest. Hall appealed and the Montana Supreme Court granted him relief as noted above.

In overturning the Montana court's decision, this Court noted that:

> It is a "venerable principle[e] of double jeopardy jurisprudence" that "[t]he successful appeal of a judgment of conviction on any ground other than the insufficiency of the evidence to support the verdict, Burks v. United States, [437 U.S. 1 [57 L.Ed.2d 1, 98 S.Ct. 2141] (1978)], poses no bar to further prosecution on the same charge." United States v. Scott, 437 U.S. 82, 90-91, 57 L.Ed.2d 65, 98 S.Ct. 2187 (1978).

Montana v. Hall, 481 U.S. at 402. The Court went on to

state that, "It is clear that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument. E.G., United States v. Ball, 163 U.S. 662, 672, 41 L.Ed. 300, 16 S.Ct. 1192 (1896)." Id., at 404. Additionally, the Court stated:

> Although Montana's ex post facto law clause prevents Montana from convicting respondent of incest, we see no reason why the State should not be allowed to put respondent to a trial on the related charge of sexual assault. There is no suggestion that the evidence introduced at trial was insufficient to convict respondent. See Burks v. United States, supra. Montana originally sought to try respondent for sexual assault. At respondent's behest, Montana tried him instead for incest. In these circumstances, trial of respondent for sexual assault, after reversal of respondent's incest conviction on grounds unrelated to guilt or innocence, does not offend the Double Jeopardy Clause.

Id., at 403.

In the case at bar, the respondent asserts that the State's proof at the first trial was not insufficient. Rather, the State's theory of the offense was not appropriate under Arkansas' capital murder statute. There was in effect, a deficiency in the charging instrument. The Arkansas Supreme Court did not reverse the previous convictions on grounds of Parker's guilt or innocence. Indeed, the Court noted in the first appeal that the killings Parker committed "were obviously a form of criminal

homicide of some degree." Parker, 292 Ark. at 425, 731 S.W.2d at 758. Based on the foregoing, the respondent asserts that Parker's claim of a double jeopardy violation is without merit.

III.

PARKER'S DEATH SENTENCE WAS NOT ENTERED IN VIOLATION OF THE EIGHTH AMENDMENT

Parker next argues that his case presents this Court with an opportunity to discuss the Eighth Amendment reliability requirement of a capital sentencing determination in light of contradictory penalty phase findings. He contends that the jury returned contradictory findings at the penalty phase of his trial with respect to aggravating and mitigating circumstances. The respondent cannot agree.

The jury unanimously found beyond a reasonable doubt that Parker previously committed another felony, an element of which was the use of threat of violence to another person. The verdict forms also indicate that one or more members of the jury believed, but the jury did not unanimously agree, that Parker had no significant history of prior criminal activity. Parker asserts that these findings are in conflict.

It easy to see that the jury could have unanimously found that Parker committed the prior violent felonies alleged by the State as an aggravating circumstance and for

some of the jurors to believe that these prior violent felonies did not constitute evidence of a significant history of prior criminal activity. There is nothing inherently contradictory about these findings and one does not have to speculate as to how the a juror might have reach both of these conclusions on the facts presented. Parker admitted in his brief on direct appeal that it was not impossible to reconcile these two findings. Indeed it is not impossible. It is not even difficult.

In the case of Miller v. State, 269 Ark. 341, 605 S.W.2d 430 (1980), the Arkansas Supreme Court was confronted with an argument similar to that now presented by Parker and noted the following:

> It is a matter of judgment whether the facts support the findings of the jury of aggravating and mitigating circumstances, but we will not substitute our judgment for the judgment of the jury that heard the evidence if there is a reasonable and understandable application of the facts to the statutory circumstances. The basic issue is whether, on the evidence, the jurors could sincerely and honestly have made the finding as they understood the question. If their answer to a question had been wholly arbitrary, a different problem would confront us. But here their answers were not arbitrary. We have before us a record of all the evidence presented to the jury to help us decide whether this jury acted capriciously in imposing the death sentence. We can put ourselves in the jurors' position and understand what they meant by answering the interrogatories as they did. That we

> might have interpreted an interrogatory differently does not require us to set aside a death sentence that was deliberately and conscientiously agreed upon by the persons who had the advantage of hearing the testimony as it was given.

Miller, 269 Ark. at 355, 605 S.W.2d at 439. Relying on the Miller case, the Arkansas Supreme Court rejected Parker's claim that the jury had rendered a death verdict based on inconsistent findings. Parker v. State, 300 Ark. 360, 368, 779 S.W.2d 156, 160 (1989).

In the case at bar, the State asserts that based on the evidence presented there was a reasonable and understandable application of the facts to the aggravating and mitigating circumstances by the jury. As such, no Eighth Amendment violation occurred. Therefore, this Court should decline to exercise its certiorari jurisdiction.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefor. This case contains no issues worthy of such review. The points raised by the petitioner do not demonstrate that constitutional error has occurred. Therefore, for the reasons and authorities cited in respondent's brief in opposition to the petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

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June 28, 1990

Mr. Joseph Spaniol, Jr.
Clerk
United States Supreme Court
No. 1 First Street, N.E.
Washington, D.C. 20543

Re: William Frank Parker V. State of Arkansas
October Term 1989, No. 89-7631

Dear Mr. Spaniol:

Please find enclosed for filing 12 copies of the respondent's brief in opposition to petition for writ of certiorari in the above-styled case. Opposing counsel has been served as indicated on the enclosed certificate of service.

Sincerely,

JACK GILLEAN
Assistant Attorney General
(501) 682-5321

JG/dc
Enclosure

NO. 89-7631

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AFFIDAVIT OF MAILING

I, Jack Gillean, am a member of good standing of the Bar of this Court. I hereby state, pursuant to the Rules of the Supreme Court of the United States, that, to my knowledge, the requisite number of copies of the Brief for Respondent in Opposition to Petition for Writ of Certiorari were mailed June 28, 1990, by placing them in the United States Mail, postage prepaid, and designated as first class mail. The respondent's brief is due in this Court on June 28, 1990.

Respectfully submitted,

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COUNSEL OF RECORD

STATE OF ARKANSAS)
) ss
COUNTY OF PULASKI)

SWORN to and subscribed before me this 28th day of June, 1990.

Debra Lynn Cooper
NOTARY PUBLIC

My Commission Expires:

September 10, 1990